UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. WASHINGTON DEPARTMENT OF FISH & WILDLIFE, *et al.*, Defendants.	Case No. C21-169-RSL ORDER GRANTING MOTION TO DISMISS AND GRANTING MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT

This matter comes before the Court on (1) defendants Washington State Department of Fish and Wildlife and its named Commissioners' "Motion to Dismiss Pursuant to FRCP 12(b)(1) & (6)" (Dkt. # 16); (2) plaintiff Wild Fish Conservancy's "Motion for Leave to File First Amended and Supplemental Complaint" (Dkt. # 18), and (3) plaintiff's "Motion to Supplement the Factual Record" (Dkt. # 34). The Court heard oral arguments on the motion to dismiss and the motion for leave to file an amended complaint on November 2, 2022 (Dkt. # 28). Having heard the arguments and reviewed the submissions of the parties and the remainder of the record, the Court finds as follows:

I. Endangered Species Act Framework

This case arises under the Endangered Species Act ("ESA"). The ESA is a federal statute enacted to provide a program to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") share responsibility for

administering the ESA. 50 C.F.R. § 402.01(b).[1] Pursuant to Section 4 of the ESA, the FWS and the NMFS are empowered to designate species as "endangered"[2] or "threatened."[3] Pursuant to Section 9 of the ESA, it is unlawful to "take"[4] an endangered species. 16 U.S.C. § 1538(a)(1)(B). The regulations promulgated under the ESA extend this Section 9 protection to certain threatened species. See 50 C.F.R. § 223.203(a); 50 C.F.R. § 17.31(a).

The ESA provides mechanisms that exempt certain takings of endangered or threatened species from Section 9 liability. These mechanisms include ESA Section 10 and regulations promulgated under ESA Section 4(d). Under Section 10, the FWS and NMFS may permit (1) acts "for scientific purposes or to enhance the propagation or survival of the affected species . . ." and (2) takings "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1). Regulations promulgated under Section 4(d) of the ESA provide take prohibition exemptions for (1) artificial propagation programs for which a state or federal Hatchery and Genetics Management Plan ("HGMP") meeting delineated criteria has been approved by the NMFS, 50 C.F.R. § 223.203(b)(5), and (2) actions undertaken in compliance with a resource management plan jointly developed by the States of Washington, Oregon and/or Idaho and the tribes meeting delineated criteria, id. § 223.203(b)(6), among

[1] The NMFS has jurisdiction over marine and anadromous species, and the FWS has jurisdiction over terrestrial and freshwater species. See 50 C.F.R. §§ 17.11, 223.102, 224.101.

[2] "Endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532(6).

[3] "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

[4] "Take" means "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). In turn, "harm" means "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

others.[5] These Section 4(d) regulatory exemptions are known as "Limit 5" and "Limit 6," respectively.

When non-federal actors seek a Limit 5 or Limit 6 exemption, they invoke the FWS or NMFS's duty to consult under Section 7 of the ESA. Section 7 requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . ." 16 U.S.C. § 1536(a)(2). Section 7 provides a three-step process:

> (1) An agency proposing to take an action must inquire of the [FWS or NMFS] whether any threatened or endangered species "may be present" in the area of the proposed action. See 16 U.S.C. § 1536(c)(1).
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> (2) If the answer is affirmative, the agency must prepare a "biological assessment" to determine whether such species "is likely to be affected" by the action. Id. The biological assessment may be part of an environmental impact statement or environmental assessment. Id.
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> (3) If the assessment determines that a threatened or endangered species "is likely to be affected," the agency must formally consult with the [FWS or NMFS]. Id. § 1536(a)(2). The formal consultation results in a

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[5] The applicable regulation, 50 C.F.R. § 223.203(b), applies to steelhead and Chinook salmon. It does not, however, apply to bull trout. See 50 C.F.R. § 223.203(b) ("The limits to the prohibitions of paragraph (a) of this section relating to threatened West Coast salmon ESUs and steelhead DPSs (of the genus Oncorhynchus) listed in § 223.102 are described in the following paragraphs.") 50 C.F.R. § 17.32 provides the general permitting rules applicable to bull trout, and 50 C.F.R. § 17.44(w) provides special rules applicable to bull trout. See 50 C.F.R. § 17.32 ("Upon receipt of a complete application the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife."); see also 50 C.F.R. § 17.44(w)(2) ("In the following instances you may take this species in accordance with applicable State, National Park Service, and Native American Tribal fish and wildlife conservation laws and regulations, as constituted in all respects relevant to protection of bull trout in effect on November 1, 1999: (i) Educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act; or (ii) Fishing activities authorized under State, National Park Service, or Native American Tribal laws and regulations.").

Neither party raises this discrepancy. The Court declines to consider any differentiation under the regulations, as it is undisputed that appropriate permits and exemptions have been obtained.

> "biological opinion" issued by the [FWS or NMFS]. See id. § 1536(b). If the biological opinion concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat, see id. § 1536(a)(2), then the action may not go forward unless the [FWS or NMFS] can suggest an alternative that avoids such jeopardization, destruction, or adverse modification. Id. § 1536(b)(3)(A). If the opinion concludes that the action will not violate the [ESA], the [FWS or NMFS] may still require measures to minimize its impact. Id. § 1536(b)(4)(ii)-(iii).

Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985); see also 50 C.F.R. § 402, subpart B (consultation procedures).

Section 11 of the ESA provides a "citizen suit" provision. Pursuant to this provision, "any person may commence a civil suit on his own behalf" "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof," among other suit authorizations. 16 U.S.C. § 1540(g)(1)(A). However, no action may be commenced under this provision "prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation," among other limitations. Id. § 1540(g)(2)(A)(i). The ESA's citizen suit provision imbues the district courts with the jurisdiction to "enforce any such provision or regulation." Id. at § 1540(g)(1).

II. Background

Plaintiff is a nonprofit organization dedicated to the preservation and recovery of Washington's native fish species and the ecosystems upon which those species depend. Dkt. # 1 at ¶ 11. Defendants are a Washington State agency that implements fish hatchery programs in the state and its commissioners. Id. at ¶¶ 16-18.

Plaintiff brings this action under the citizen suit provision of the ESA. This is not the first time that plaintiff has sued defendants under the citizen suit provision of the ESA. Plaintiff first filed ESA citizen suits in 2002 and 2003 alleging that defendants failed to obtain ESA reviews or approvals for its Puget Sound hatcheries. See Wild Puget Sound, et al v. Koenings, et al, No. C02-1852-RSL (W.D. Wash.); Threatened Puget, et al v. Koenings, et al, No. C03-

687-RSL (W.D. Wash.); see also Dkt. # 18-2 at ¶ A. The parties resolved those suits through a 2003 settlement agreement that required defendants to work to secure ESA reviews and approvals and prohibited plaintiff from initiating litigation against defendants for its hatchery programs for ten years. See Wild Puget Sound, No. C02-1852-RSL at Dkt. # 37 (W.D. Wash. May 15, 2003); Threatened Puget, No. C03-687-RSL at Dkt. # 18 (W.D. Wash. May 15, 2003); see also Dkt. # 18-2 at 4-17. Plaintiff sued defendants again in 2014 and 2019, this time in relation to ten additional hatchery programs. See Wild Fish Conservancy v. Anderson et al, C14-465-JLR (W.D. Wash.); Wild Fish Conservancy v. Washington Department of Fish & Wildlife et al, C19-612-JLR (W.D. Wash.); see also Dkt. # 18-2 at ¶¶ B-C. The parties resolved both suits through consent decrees that imposed various restrictions on defendants' hatchery programs. See Wild Fish Conservancy, C14-465-JLR at Dkt. # 22 (W.D. Wash. Apr. 28, 2014); Wild Fish Conservancy v. Washington Department of Fish & Wildlife et al, C19-612-JLR at Dkt. # 7 (W.D. Wash. May 2, 2019); see also Dkt. # 18-2 at 22-33, 35-45.

At issue here is defendants' integrated summer steelhead hatchery program on the South Fork of the Skykomish River in Snohomish County, Washington (the "Skykomish Program"). Defendants commenced the Skykomish Program prior to the NMFS reviewing and approving the HGMP and prior to the NMFS or FWS providing an authorization for defendants to take ESA-listed species. See Dkt. # 16 at 2. Plaintiff alleges that the Skykomish Program causes take of threatened fish species in violation of Section 9 of the ESA. In particular, plaintiff alleges that the Skykomish Program causes take of the Puget Sound distinct population segment ("DPS") of steelhead, the Puget Sound evolutionary significant unit ("ESU") of Chinook salmon, and the coterminous U.S. bull trout. See Dkt. # 1 at ¶ 57. Such steelhead, Chinook salmon, and bull trout are listed as threatened species under the ESA, see 50 C.F.R. §§ 17.11(h), 223.102, and are among the threatened fish protected by the ESA's anti-take provision, see 50 C.F.R. §§ 17.31(a), 223.203(a). Plaintiff further alleges that defendants are engaged in a pattern and practice of implementing hatchery programs throughout the State of Washington that

take ESA-listed species without ESA authorizations in violation of Section 9 of the ESA. Dkt. # 1 at ¶¶ 72-74.

Defendants submitted an HGMP to the NMFS dated April 12, 2019, pursuant to regulations promulgated under Section 4 of the ESA. Dkt. # 6 at 2. Defendants also submitted a request for the NMFS to issue a permit under Section 10 of the ESA for a trap and haul program at Sunset Falls within the South Fork of the Skykomish River, whose activities included collection of broodstock for the hatchery program. Id. These two applications sought exemptions and/or permits providing exemptions from liability under Section 9 of the ESA for operations of the Skykomish Program. Id.

On December 2, 2020, plaintiff mailed a notice of its intent to sue under the ESA to defendants. Dkt. # 1 at 21-28. The notice focused on the Skykomish Program, but framed the implementation of the Skykomish Program in the absence of ESA review or approval as part of a "long and disconcerting pattern of the agency willing to violate the ESA's prohibition on unauthorized 'take' of protected species when it comes to artificial fish propagation," and noted that defendants "continue[] . . . operating numerous hatcheries without NMFS's authorization and in violation of the ESA and, for many of the programs [defendants] ha[ve] not even submitted the plan required for NMFS's review." Id. at 23-24. The notice alleged that defendants were in violation of Section 9 of the ESA as follows:

> WDFW is in violation of section 9 of the ESA, 16 U.S.C. § 1538, for implementing and funding the new integrated South Fork Skykomish River summer steelhead program described in the HGMP. As described above, these programs cause take of ESA-listed Puget Sound steelhead, Puget Sound Chinook salmon, and bull trout. This take is not authorized or exempt from liability under section 9 of the ESA . . . The Conservancy intends to sue WDFW for all take of ESA-listed salmonids resulting from this new hatchery program.
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> . . . . [Hatchery Science Review Group gene flow recommendations] and/or similar requirements, including requirements intended to reduce take of ESA-listed species through ecological interactions, would be imposed on WDFW's new integrated South Fork Skykomish River summer steelhead

> program through any exemption from liability under section 9 of the ESA that may be granted, along with monitoring and evaluation requirements necessary to ensure compliance with such requirements. It is unlikely that WDFW would be able to fully comply with these requirements and the hatchery program will contribute to the continued decline of ESA-listed salmonids. And in any case, WDFW does not have such authorization now, and therefore their 2019 and 2020 take of unmarked and/or wild steelhead from the South Fork of the Skykomish and transfer to Reiter Ponds violated the ESA.
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> Accordingly, the Conservancy provides notice of its intent to sue WDFW to bring its new integrated South Fork Skykomish River summer steelhead program described in the HGMP into compliance with section 9 of the ESA. This includes complete compliance with any exemption from ESA liability for take that may be lawfully issued in accordance with the requirements of the ESA, the National Environmental Policy Act, and any other applicable statutes and regulations.

Id. at 26-27.

After the passage of the statutorily mandated 60-day period, plaintiff filed the instant action on February 10, 2021. See Dkt. # 1.

On March 5, 2021, at the request of the parties, the Court stayed proceedings to allow time for NMFS and FWS to issue decisions on whether to provide defendants' requested take exemptions/authorizations for the Skykomish Program. See Dkt. # 7. The Court's order also prohibited defendants from collecting steelhead to supply broodstock for the Skykomish Program and from releasing hatchery fish from the Skykomish Program until such time as both the NMFS and FWS had provided authorizations for the Skykomish Program to take ESA-listed species. See id.

On April 23, 2021, defendants received a biological opinion ("BiOp") and incidental take statements ("ITS") from the NMFS that included exemptions from liability under Section 9 of the ESA for the Skykomish Program. Dkt. # 14 at 2; see also NMFS, Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat (EFH) Consultation (NMFS Consultation Number:

WCRO-2019-04075), April 23, 2021 ("NMFS Consultation") (regarding steelhead and Chinook salmon).[6]

On July 2, 2021, NMFS issued a letter of concurrence approving the HGMP for the Skykomish Program and thereby exempted the steelhead and Chinook salmon operations of the Skykomish Program from liability under Section 9 of the ESA so long as the Skykomish Program complied with implementation terms and reporting requirements of the associated BiOp. Dkt. # 14 at 2; see also Dkt. # 22-1 (letter of concurrence).

On August 20, 2021, plaintiff served on defendants a supplemental 60-day notice of intent to sue under the ESA. Dkt. # 14 at 3; see also Dkt. # 18-1 at 46-57 (supplemental notice). Regarding the Skykomish Program, the supplemental notice asserted:

> WDFW began the Skykomish Program, including taking listed broodstock, prior to having ESA authorization and in advance of the proposed program undergoing technical review by the federal regulators charged with upholding the ESA. Only after the Skykomish Program was well underway, and effectively a foregone conclusion, was it reviewed and authorized by NMFS and FWS. This violates the intent of ESA review and approval of proposals which may impact listed species – to prohibit proposed programs which are too impactful, or to iteratively improve proposals via feedback from the services to further minimize negative impacts to listed populations.

[6] The parties' joint status report states that defendants received BiOps from both NMFS and FWS including exemptions from liability under ESA Section 9. See Dkt. # 14 at 2. Defendants' declaration of Joseph Coutu indicates that defendants and the Tulalip Tribes received the FWS BiOp and ITS on April 12, 2021. See Dkt. # 22 at ¶ 4. However, defendants did not provide a citation to the FWS report sufficient to allow the Court to review the document. In contrast, defendants' declaration of James Scott provides a viable citation to the NMFS Consultation, which covers only the steelhead and Chinook salmon at issue. See Dkt. # 17 at 12, 15, 17, 19. The NMFS Consultation indicates that the FWS, as the agency responsible for administering bull trout, would issue a separate ESA Section 7 consultation regarding bull trout. See NMFS Consultation, p. 20. Nonetheless, it is undisputed that defendants obtained exemptions from liability under ESA Section 9 for the Skykomish Program, and plaintiff does not suggest that defendants failed to obtain exemptions regarding bull trout. See Dkt. # 16 at 2.

Dkt. # 18-1 at 47. The supplemental notice also asserted that "WDFW has and continues to engage in a pattern of operating and implementing hatchery programs without ESA authorizations or approvals, and approvals being issued only following the initiation of litigation." Id. To this end, the supplemental notice provided notice of ESA Section 9 violations for causing take of ESA-listed species prior to obtaining ESA authorization or exemption from Section 9 liability for the following fourteen programs: (1) Whatcom Creek (Fall Chinook), (2) Hupp Springs (Spring Chinook), (3) Kendall Creek North Fork Nooksack (Spring Chinook), (4) Samish (Fall Chinook), (5) Deep River Net Pen (SAFE) (Coho), (6) Lewis River (Coho), (7) Lewis River (Coho (type S)), (8) Lewis River (I-205 wild) (Fall Chum), (9) Lewis River (Speelyai) (Spring Chinook), (10) Chambers Creek (Fall Chinook), (11) George Adams (Fall Chinook), (12) Tumwater Falls (Fall Chinook), (13) Cowlitz (Spring Chinook), and (14) Cowlitz (Lower + Mayfield NP) (Fall Chinook). Id. at 48-52, 55.

On September 9, 2021, defendants filed the motion to dismiss presently before the Court. Dkt. # 16.

On September 16, 2021, plaintiff filed the motion for leave to file the first amended and supplemental complaint presently before the Court. Dkt. # 18. Plaintiff's motion included the proposed amended and supplemental complaint. The proposed amended and supplemental complaint increases focus on defendants' pattern of implementing hatchery programs that harm threatened salmonids prior to obtaining ESA reviews and approvals, includes alleged ESA Section 9 violations for all of the hatcheries named in the supplemental notice except for the Deep River Net Pen program,[7] and alleges that the Skykomish Program violated Section 9 of the ESA prior to obtaining ESA authorizations and exemptions and "will continue to violate section 9 of the ESA, 16 U.S.C. § 1538, unless WDFW fully complies with NMFS's and FWS's BiOp and ITS for the hatchery program and with the provisions of the HGMP and NMFS's approval of the HGMP." Dkt. # 18-1 at ¶ 81; see generally Dkt. # 18-1. The proposed amended

[7] The Deep River Net Pen program obtained an exemption from take a few months before plaintiff issued its supplemental notice letter. See Dkt. # 19 at 2 n.2.

and supplemental complaint asks the Court to (1) issue a declaratory judgment declaring that defendants are in violation of Section 9 of the ESA and regulations promulgated under Section 4(d) of the ESA for causing take of ESA-listed salmonids through the implementation and funding of defendants' hatchery programs, (2) issue a mandatory injunction requiring defendants to comply with the ESA, (3) enjoin defendants from implementing and funding hatchery programs unless and until compliance with the ESA is obtained, (4) grant certain preliminary, permanent declaratory, and/or injunctive relief as is warranted to ensure defendants' violations of the ESA do not continue to recur, (5) award plaintiff attorney's fees, and (6) grant such additional relief as the Court deems just and proper. Id. at 29, ¶¶ A-F.

III. Motion to Dismiss

Defendants move the Court to dismiss plaintiff's claims under Rule 12(b)(1) for lack of subject-matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court finds that plaintiff's claim that defendants were violating Section 9 by operating the Skykomish Program without exemptions is moot, as defendants have now obtained exemptions. The Court finds that plaintiff's remaining claim – that the Skykomish Program is causing unlawful take regardless of its exemptions – fails to state a claim upon which relief can be granted. We address the moot claim first.

A. Claim that Skykomish Program Violated Section 9 by Operating Without Exemptions

Rule 12(b)(1) authorizes a motion for dismissal based on a lack of subject-matter jurisdiction. When a court lacks subject-matter jurisdiction, it lacks the power to proceed, and its only remaining function is to dismiss. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998). "A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the

challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, defendants bring a factual attack, asserting that the allegations that they are operating the Skykomish Program without an exemption from ESA Section 9 liability are false because they obtained exemptions after plaintiff filed the complaint. Therefore, they argue, the case is moot.

If the case is moot, the Court lacks subject-matter jurisdiction. Article III of the U.S. Constitution limits the federal courts' jurisdiction to actual cases or controversies, Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997), as amended (Sept. 16, 1997), and "prohibits federal courts from taking further action on the merits in moot cases," Env't Prot. Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1076 (9th Cir. 2001). Whenever a case loses its character as a present, live controversy, it is moot. Am. Rivers, 126 F.3d at 1123. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Ctr. for Biological Diversity v. Marina Point Dev. Co., 566 F.3d 794, 804 (9th Cir. 2009) (citations omitted). "The party asserting mootness bears a 'heavy' burden; a case is not moot if any effective relief may be granted." Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1017 (9th Cir. 2012) (citation omitted). Declaring an issue moot "is justified only when it is 'absolutely clear' that the litigant no longer has 'any need of the judicial protection that it sought.'" Id. (citing Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000) (per curiam)).

Defendants argue that plaintiff's claims are moot because defendants have now obtained exemptions from ESA Section 9 liability for operation of the Skykomish Program. While the Ninth Circuit has addressed related questions,[8] it has not issued a published opinion resolving

[8] For example, the Ninth Circuit has ruled (1) that when one BiOps supersedes another, a challenge to the superseded BiOps is moot, Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1096 (9th Cir. 2003) (citing Am. Rivers, 126 F.3d at 1123-24); (2) that claims seeking reconsultation under the ESA are moot upon completion of reconsultation, see, e.g. All. for the Wild Rockies v. Savage, 897 F.3d 1025, 1031 (9th Cir. 2018); cf. Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt., 36 F.4th 850, 884-85 (9th Cir. 2022) (holding that, because consultation with the FWS was still ongoing, the court had jurisdiction over a claim that an agency failed to consult before acting); and (3) that suits seeking to

whether an interceding exemption moots a citizen suit claiming unlawful take under Section 9 of the ESA. The only Ninth Circuit caselaw addressing this question of which this Court is aware is the memorandum disposition issued in Wild Fish Conservancy v. Nat'l Park Serv., 687 F. App'x 554 (9th Cir. 2017), which affirmed the district court's ruling in Wild Fish Conservancy v. Nat'l Park Serv., No. C12-5109 BHS, 2013 WL 549756, at *2 (W.D. Wash. Feb. 12, 2013). The Ninth Circuit's explanation of its reasoning, however, was minimal. The Ninth Circuit ruled as follows:

> The district court correctly found the Conservancy's initial claim that the Tribe was taking fish without authorization moot in light of NMFS's Limit 6 approval and Incidental Take Statement. See Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997) ("If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed."). The district court also correctly found that any claim against the Tribe for taking in violation of NMFS's authorization was barred for lack of notice. 16 U.S.C. § 1540(g)(2)(A)(i); see Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998) (holding that citizen-plaintiff must "provide sufficient information of a violation so that the [defendant] could identify and attempt to abate the violation").

Wild Fish Conservancy, 687 F. App'x at 558. While the Court is not bound by this unpublished decision or the district court ruling it affirmed, it looks to both as persuasive precedent.

In light of the caselaw discussed above, the Court concludes that it can no longer grant meaningful relief on plaintiff's claims grounded in the allegation that the Skykomish Program is

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reinitiate ESA consultation are moot upon reinitiation of consultation, see, e.g., All. for the Wild Rockies v. U.S. Forest Serv., 907 F.3d 1105, 1121 (9th Cir. 2018); All. for the Wild Rockies v. U.S. Dep't of Agric., 772 F.3d 592, 601 (9th Cir. 2014); but see Forest Guardians v. Johanns, 450 F.3d 455, 462 (9th Cir. 2006) (holding that reinitiation claim was not moot where the grazing permit at issue "requires that the Forest Service obtain from FWS annual concurrence that the guidance criteria governing the 'not likely to adversely affect' finding have been met," and "the Forest Service's practice of not complying with the monitoring requirements is likely to persist despite the recent re-consultation").

unlawfully taking ESA-listed species without an exemption from ESA Section 9 liability.[9] The Court cannot order defendants to seek an exemption because defendants have already obtained an exemption. Cf. Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978) ("Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot."). Any other relief would serve no purpose because plaintiff's core objective has been met. Cf. Ctr. for Biological Diversity v. Lohn, 511 F.3d 960, 964 (9th Cir. 2007) ("[D]eclaring the DPS Policy unlawful would serve no purpose in this case because the Service has listed the Southern Resident as an endangered species, the Center's ultimate objective. That the DPS Policy might adversely affect the Southern Resident's endangered species status or the Service's listing determination of certain other killer whale populations at some indeterminate time in the future is too remote and too speculative a consideration to save this case from mootness."). These claims are accordingly moot.

Plaintiff argues that the claims are not moot because: (A) obtaining the exemption is insufficient to moot the case, (B) defendants' continuing practice and history of violating the ESA means that meaningful relief remains available, (C) this case falls within the voluntary cessation exception to the mootness doctrine because defendants ceased operating the Skykomish Program while obtaining the exemption, and (D) further development of the facts is necessary before the Court can rule on mootness. While plaintiff's arguments are well reasoned, the Court is ultimately not persuaded. The Court considers each argument in turn.

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[9] While the Court recognizes that plaintiff generally couched its request for relief in generic terms, perhaps in an attempt to avoid mootness in the event that defendants obtained an exemption during the pendency of this litigation, plaintiff's request for relief nonetheless relies on the assertion that the Skykomish Program was operating without the permit. See Dkt. # 1 at 19, ¶ A (Plaintiff requests that the Court "[i]ssue a declaratory judgment declaring that WDFW is in violation of section 9 of the ESA and regulations promulgated under section 4(d) of the ESA for causing 'take' of threatened Puget Sound steelhead, threatened Puget Sound Chinook salmon, and threatened bull trout *through the implementation and funding of the* ***unreviewed and unpermitted*** *South Fork Skykomish River summer steelhead program*") (emphasis added). The Court discusses below why plaintiff's claims regarding post-exemption unlawful take must also be dismissed.

1. Exemption

Plaintiff argues that obtaining an exemption cannot moot the case because an ESA exemption is merely an affirmative defense. See Dkt. # 20 at 16-18, 20-21. Under Rule 4(d), NMFS' approval of a plan provides an "affirmative defense" against allegations of unlawful take that "must be raised, pleaded, and proven by the proponent." 50 C.F.R. § 223.203(c).[10] Plaintiff contends that because its complaint alleged that the Skykomish program was causing unlawful take (not only that it was operating without an exemption), the issuance of an exemption means only that defendants now have an affirmative defense available. See Dkt. # 20 at 17. Plaintiff further argues that as a result, the case cannot be moot as defendants have made no effort to prove compliance with the exemptions or establish that they "have completely or irrevocably eradicated the effects of the alleged violation." Dkt. # 20 at 18 (quoting Chang v. United States, 327 F.3d 911, 918 (9th Cir. 2003)).

The case on which Plaintiffs rely for the proposition that defendants bear the burden of proving compliance with exemptions, United States v. Charette, is inapposite. 893 F.3d 1169, 1174 (9th Cir. 2018). That case held that a private party being prosecuted for "take" of an endangered species in violation of the ESA bears the burden of proving he or she had a valid take permit as an affirmative defense *in a criminal action.* Id.; see also Nw. Env't Def. Ctr. v. U.S. Army Corps of Eng'rs, 479 F.Supp.3d 1003, 1021 n.8 (D. Or. 2020). Furthermore, review of the relevant statutory text reveals the affirmative defense arises only after an exemption has been issued:

> In connection with any action alleging a violation of section 1538 of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is

[10] As plaintiff notes, a BiOp and ITS issued under section 7 can similarly function as a permit authorizing take, and also provides an "affirmative defense against a claim alleging take in violation of the ESA." See Dkt. # 20 at 11 (citing 16 U.S.C. §§ 1536(o)(2), 1539(g); H.R. Rep. No. 94-823, at 6 (1976)).

> applicable, has been granted, and ***was valid and in force at the time of the alleged violation***.

16 U.S.C. § 1539(g) (emphasis added). A common sense reading of the statute compels the conclusion that now that exemptions have been issued for the Skykomish Program, defendants will have an affirmative defense to allegations of unlawful take. Specifically, they will have an "absolute defense" to liability under Section 9 as long as they can demonstrate complete compliance with the terms of the exemption. See 50 C.F.R. § 223.203(c). However, where the allegation against defendant is specifically that it is causing take by operating without authorization, the affirmative defense cannot be available as the very allegation at issue is that no permit or exemption "has been granted." 16 U.S.C. § 1539(g).

Plaintiff's attempt to invoke the affirmative defense to stave off mootness construes the issue too broadly. The Court does not find plaintiff's overarching claim that defendant is violating Section 9 moot. It simply finds plaintiff's claim that defendants were taking fish without authorization is moot, as defendants have now obtained the relevant exemptions.

Plaintiff argues against this conclusion, citing Native Fish Soc'y v. Nat'l Marine Fisheries Serv., No. C12-431-HA, 2013 WL 12120102 (D. Or. May 16, 2013), and Strahan v. Roughead, 910 F.Supp.2d 358, 377-78 (D. Mass. 2012). However, neither opinion is binding on this Court, and both cases dealt with whether plaintiff's overall Section 9 claims were mooted by the issuance of exemptions in contrast to the more specific question we address here. Native Fish Soc'y, 2013 WL 12120102, at *9; Strahan, 910 F.Supp.2d at 374.

Indeed, the court in Native Fish Soc'y explicitly acknowledged that it had "no trouble in conceiving of a situation in which the issuance of an ITS would moot a plaintiff's claims or allegations [of section 9 violations]." 2013 WL 12120102, at *9 n.6. Other district courts in this circuit have similarly concluded that "case law confirms that issuance of [an agency exemption] moots ESA Section 9 claims." Oregon Wild v. Connor, No. C9-185-AA, 2012 WL 3756327, at *2 (D. Or. Aug. 27, 2012) (collecting cases); see also All. for Wild Rockies v. Burman, 499 F.Supp.3d 786, 794 (D. Mont. 2020) (concluding that where "incidental take of

bull trout has been authorized by the ITS . . . [plaintiff] has achieved its relief sought and the Section 9 claim is moot."); Wild Equity Inst. v. City and Cnty. of S.F., No. C11-958-SI, 2012 WL 6082665, *3 (N.D. Cal. Dec. 6, 2012) (finding that "[t]he ITS now authorizes take of the Frog and the Snake . . . [i]f the City fails to abide by the terms of the ITS, then plaintiffs will have a new cause of action, but until then the City is shielded from liability."); Wild Fish Conservancy, 2013 WL 549756, at *2.

2. Relief Available

Plaintiff next argues that defendants' continuing practice and history of violating the ESA means that meaningful relief remains available. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 307 (2012) (citing City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000)) (internal punctuation omitted). With regards to the Skykomish Program, the Court disagrees that relief remains available. As discussed above, the Skykomish Program has already obtained its exemptions, and the Court is therefore unable to grant meaningful injunctive relief.

Declaratory relief is also inappropriate. Plaintiff argues that declaratory judgment would provide effective relief because it would guide defendants' future implementation and operation of many hatchery programs that do not have ESA approvals and would ensure that defendants do not continue their unlawful practices. See Dkt. # 20 at 22. The cases that plaintiff relies upon, Johanns and Tidwell, are distinguishable. In Johanns, the specific grazing permit at issue required the Forest Service to obtain annual concurrence from the FWS. The Ninth Circuit reasoned that declaratory relief was appropriate because "a declaratory judgment that the Forest Service's actions relating to Water Canyon violated the ESA would provide effective relief by governing the Forest Service's actions *for the remainder of the allotment's permit term* and by prohibiting it from continuing to violate the law." Johanns, 450 F.3d at 462-63 (emphasis added). A declaratory judgment regarding a specific permit is much narrower in scope than a declaratory judgment regarding defendants' entire hatchery program. Tidwell, as a decision of

the U.S. District Court for the District of Oregon, is not binding on this Court. Nonetheless, it is likewise distinguishable on the ground of scope. There, the plaintiffs' claims went to the NMFS and Forest Service's management of grazing permits in the Malheur National Forest. Oregon Nat. Desert Ass'n v. Tidwell, 716 F. Supp. 2d 982, 989 (D. Or. 2010). The court found that the defendants had not carried their heavy burden of establishing that the court could provide no effective relief for the violations alleged because the grazing activities continued to be managed under the same BiOp "and declaratory judgment that the Forest Service violated the ESA by failing to timely reinitiate formal consultation could provide effective relief." Id. at 994-95. Unlike the plaintiffs in Johanns and Tidwell, plaintiff does not assert it requires declaratory relief regarding the specific program at issue – the Skykomish Program – but rather indicates that declaratory relief could guide defendants' other hatchery programs. See Dkt. # 20 at 22-23. This argument does not save plaintiff's initial claims from mootness.

3. Voluntary Cessation

Third, plaintiff argues that this case falls within the voluntary cessation exception to the mootness doctrine because defendants ceased operating the Skykomish Program while obtaining the exemption. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). Plaintiff's argument fails because while it is true that defendants voluntarily ceased operating the Skykomish Program pending receipt of exemptions, see Dkt. # 7 (order granting parties' stipulated motion to cease Skykomish Program operations pending obtaining ESA exemptions), the exemptions have now been obtained. "The ESA allows a citizen suit for the purpose of obtaining injunctive relief only." Marina Point Dev. Co., 566 F.3d at 804 (citing 16 U.S.C. § 1540(g)(1)(A)). "Of course, that is forward looking, and is intended to prevent a defendant from taking an endangered or threatened species." Id. (citing 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31). Given that defendants have now obtained exemptions for the Skykomish Program, it is irrelevant that

defendants voluntarily ceased operations prior to obtaining these exemptions. It would be impossible for defendants to revert to operating the Skykomish Program *prior* to obtaining exemptions, and the Court is constrained to granting forward-looking relief. [11]

Plaintiff also argues that defendant "has not demonstrated that its wrongful behavior is not reasonably likely to recur at [other hatchery programs]." Dkt. # 20 at 24. However, this argument impermissibly broadens the voluntary cessation exception. Here, the "challenged practice" that defendants voluntarily halted was the *operation of the Skykomish program* without exemptions. Defendants' alleged conduct at other hatcheries is not relevant to the voluntary cessation inquiry. Any claim that defendants are operating other hatcheries without ESA exemptions "would constitute an entirely new violation subject to judicial review." Burman, 499 F.Supp.3d at 794.

4. Evidentiary Hearing and Discovery

Finally, plaintiff argues that further development of the facts is necessary before the Court can rule on mootness. "[D]iscovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1093 (9th Cir. 2003) (quoting Butcher's Union Loc. No. 498, United Food & Com. Workers v. SDC Inv., Inc., 788 F.2d 535, 540 (9th Cir. 1986)). Plaintiff premises this argument on the idea that the Court must determine whether the Skykomish Program complies with its exemptions from Section 9 liability prior to concluding plaintiff's claims are moot. However, the only facts relevant to the

[11] Plaintiff's citation to Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169 (9th Cir. 2009), does not change the result. In Rosemere, the challenged conduct was the agency's failure to process plaintiff's complaint within the regulatory deadlines. 581 F.3d at 1171-73. The agency had voluntarily ceased the challenged behavior (refusing to process the complaint) by eventually processing plaintiff's complaint after plaintiff had commenced legal action against the agency. Id. The court held that this conduct did not moot the case because it was likely that the plaintiff would file another complaint with the agency, and again be subject to the agency's refusal to meet regulatory deadlines. Id. at 73-76. Here, as discussed above, the "voluntarily ceased" behavior is operating the Skykomish program prior to obtaining ESA exemptions, a behavior that cannot be repeated now that ESA exemptions have been obtained.

Court's mootness inquiry – which, as discussed above, is focused exclusively on plaintiff's claim that the Skykomish Program was operating without exemptions – are whether exemptions have now been obtained. Because the parties do not dispute that exemptions have been obtained, see Dkt. 20 at 13, the Court declines to defer ruling on mootness.

B. Claims That the Skykomish Program Is Causing Ongoing Unlawful Take

Defendants also move to dismiss claims that the Skykomish Program is causing ongoing unlawful take under Rule 12(b)(1) and Rule 12(b)(6).

1. Lack of Jurisdiction

Defendants argue that allegations of take beyond the bounds of the exemptions is not concretely alleged in plaintiff's notice letter to defendants, and thus must be dismissed under Rule 12(b)(1). See Dkt. # 1 at 21-28. The citizen suit provision of the ESA, under which plaintiff brings the current action, is a supplementary enforcement mechanism. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60-62 (1987) (finding that "the citizen suit is meant to supplement rather than to supplant governmental action"). One of the limits imposed on these enforcement actions is a jurisdictional sixty-day notice period. 16 U.S.C. § 1540(g)(2)(A)(i); Sw. Ctr. for Biological Diversity, 143 F.3d at 520 (citing Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988)). The core purpose of the notice requirement is to provide defendants with "an opportunity to review their actions and take corrective measures if warranted," and offer "an opportunity for settlement or other resolution of a dispute without litigation." Id. The notice must, "at a minimum provide sufficient information so that the [notified parties] could identify and attempt to abate the violation." Animal Legal Def. Fund v. Olympic Game Farm, Inc., 951 F.Supp.3d 956, 967 (W.D. Wash. 2022) (quoting Sw. Ctr. For Biological Diversity, 143 F.3d at 522) (internal punctuation omitted). "A reviewing court may examine both the notice itself and the behavior of its recipients to determine whether they understood or reasonably should have understood the alleged violations." Klamath-Siskiyou Wildlands Ctr. v. MacWhorter, 797 F.3d 645, 651 (9th Cir. 2015). "[A] notice need not provide the exact details of the legal arguments that the

plaintiffs intend to eventually make." Conservation Cong. v. Finley, 774 F.3d 611, 618 (9th Cir. 2014) (citing Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1072-73 (9th Cir. 1996)). The question is "whether the notice provided information that allowed the defendant to identify and address the alleged violations, considering the defendant's superior access to information about its own activities." Klamath-Siskiyou, 797 F.3d at 651.

Here, the notice letter was issued before the exemptions were in place. Thus, it would have been impossible for plaintiff to specifically allege that defendants were exceeding the take authorizations in the exemptions. Defendants argue that as a result, notice was insufficient, and the Court does not have jurisdiction over the claims. However, the Ninth Circuit does not require hyper technical specificity when reviewing citizen suit notices. Here, plaintiff's notice letter stated that there are "clear recommendations regarding the maximum acceptable level of gene flow from integrated hatchery programs to wild conspecific populations and regarding the introgression of natural origin fish into the broodstock along with hatchery-origin fish" and that "it is unlikely that WDFW would be able to fully comply with these requirements." Dkt. # 28-1 at 27. Furthermore, the notice letter specified that plaintiff "provides notice of its intent to sue WDWF to bring its . . . Skykomish [Program] . . . into compliance with section 9 of the ESA. This includes complete compliance with any exemption from ESA liability for take that may be lawfully issued . . . ." Id. Thus, notice was sufficient to alert defendants that plaintiff would sue due to a belief that the Skykomish Program was causing unlawful take, regardless of the exemptions obtained.

2. Failure to State a Claim

Additionally, defendants argue that plaintiff's allegations that defendants are causing unlawful take – despite their exemptions – must be dismissed for failure to state a claim upon which relief can be granted. Dkt. # 21 at 8, 11; Dkt. # 16 at 3, 5. A claim is appropriately dismissed pursuant to Rule 12(b)(6) if the claim "fail[s] to state a claim upon which relief can be granted." Whitaker v. Tesla Motors, Inc., 985 F.3d 1173, 1175 (9th Cir. 2021) (quoting Fed. R. Civ. P. 12(b)(6)). The question for the Court is whether the facts alleged in the complaint

sufficiently state a "plausible" ground for relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). To survive dismissal, plaintiff must make a "short and plain statement of the claim" from which the Court can draw the reasonable inference that the defendants are liable and that the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2); United States v. Corinthian Colls., 655 F.3d 984, 991 (9th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); see also Twombly, 550 U.S. at 570. Plaintiff must plead sufficient facts "to raise a right to relief above a speculative level," . . . "a formulaic recitation of the elements of a cause of action will not do." Whitaker, 985 F.3d at 1176 (quoting Twombly, 550 U.S. at 555). In the context of this motion, the Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted). The Court's review is generally limited to the contents of the complaint. Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996).

Here, plaintiff's claims of ongoing unlawful take are speculative. The complaint states, "Even if NMFS and/or FWS approve WDFW's HGMP or issue take statements or permits for the new hatchery program, WDFW *will likely* remain in violation of section 9 of the ESA because the South Fork Skykomish River summer steelhead program cannot satisfy the requirements imposed by NMFS and/or FWS," Dkt. # 1 at ¶ 68 (emphasis added), and goes on to state that "*it is unlikely that WDFW would be able* to fully comply with [future exemption-imposed] requirements, and the hatchery program will contribute to the continued decline of ESA-listed salmonids," id. at ¶ 71 (emphasis added). To survive a motion to dismiss, plaintiff must "raise a right to relief above a speculative level." Whitaker, 985 F.3d at 1176 (quoting Twombly, 550 U.S. at 555). Here, plaintiff has not met this standard. The complaint does not allege facts that would entitle plaintiff to relief; it merely theorizes that such facts would likely materialize. Thus, the Court grants defendants' motion to dismiss for failure to state a claim as to defendant's allegations of post-exemption take.

Plaintiff filed a motion to expand the factual record, seeking to introduce facts that would establish defendants are violating the Skykomish Program's exemptions. See Dkt. # 34.

However, a motion to dismiss under Rule 12(b)(6) generally must rely solely on the contents of the pleadings. See Fed. R. Civ. P. 12(d). There are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201. Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018). Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)-(2). Incorporation by reference allows a court to consider documents "incorporated into the complaint by reference." J. K. J. v. City of San Diego, 42 F.4th 990, 997 (9th Cir. 2021) (quoting Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007)). Neither exception applies here. The relevant report was not relied upon (as it did not exist) when plaintiff filed its complaint. And, as plaintiff acknowledges, the facts it seeks to introduce in the motion to supplement demonstrate that there is "significant factual dispute." Dkt. # 34 at 7. Accordingly, the Court denies plaintiff's motion to supplement the record.[12]

In conclusion, to the extent that plaintiff's claims regarding the Skykomish Program go to pre-exemption unlawful take, they are moot. To the extent they go to post-exemption unlawful take, they fail to state a claim upon which relief can be granted. When amendment would be futile dismissal may be ordered with prejudice. See Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996). Plaintiff's claims are therefore dismissed with prejudice with regard to the pre-exemption claims and without prejudice with regard to the post-exemption claims. Accordingly, plaintiff is free to incorporate its recent, more specific allegations against the Skykomish Program into its Amended Complaint.

[12] Plaintiff also filed a surreply moving the Court to strike materials filed with defendants' response regarding defendants' purported compliance with the ITS and approved HGMP. See Dkt. # 25. Because the Court concludes that such compliance is irrelevant to the motion to dismiss currently before the Court, it declines to consider such materials, and therefore need not rule on plaintiff's motion to strike.

IV. Motion to Amend and Supplement Complaint

Plaintiff moves the Court for leave to file a first amended and supplemental complaint adding claims regarding a number of other hatchery programs.

Plaintiff seeks to amend the complaint to include alleged violations of ESA Section 9 that occurred before the initial complaint was filed. Plaintiff does not assert, nor could it, that it is entitled to amend its pleadings as a matter of course. See Fed. R. Civ. P. 15(a)(1). Once the time has passed for amending pleadings as a matter of course, Rule 15(a)(2) provides that the Court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave to amend, however, "is not to be granted automatically." In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 738 (9th Cir. 2013), aff'd sub nom. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015) (quoting Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir. 1990)). The Court considers the following five factors to assess whether to grant leave to amend: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." Id. (quoting Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)).

Amendment here is proper. There is no sign of bad faith. Despite the passage of time, this case is still in its infancy due to a stay entered on March 5, 2021, see Dkt. # 7, thus minimizing prejudice to defendants. Amendment does not appear to be futile because amendment remedies the primary problem impacting the original complaint: mootness. Finally, this is plaintiff's first request to amend the complaint, which favors permitting amendment here. Defendants primarily argue that plaintiff should not be granted leave to amend because (1) the new claims are not related to the Skykomish Program, and (2) plaintiff's knowledge of the thirteen additional hatchery programs included in the proposed amended and supplemental complaint is not new. See Dkt. # 19 at 4-6. Defendants, however, fail to tie these objections to any of the factors that the Court considers when determining whether to grant leave to amend or to cite any law in support of these positions. See id. To the extent that defendants argue that plaintiff's original notice letter did not include the new claims, see id. at 4-5, the Court notes that

plaintiff issued a supplemental notice letter on August 20, 2021. See Dkt. # 18-1 at 46-57. The Court therefore grants plaintiff leave to amend the complaint.

Plaintiff also seeks to supplement the complaint to include alleged violations of Section 9 of the ESA that occurred after the initial complaint was filed. Under Rule 15(d), "the court may on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d). "Rule 15(d) permits the filing of a supplemental pleading which introduces a cause of action not alleged in the original complaint and not in existence when the original complaint was filed." Cabrera v. City of Huntington Park, 159 F.3d 374, 382 (9th Cir. 1998) (quoting United States v. Reiten, 313 F.2d 673, 674 (9th Cir. 1963)). Leave to permit supplemental pleading is "favored." Planned Parenthood of S. Ariz. v. Neely, 130 F.3d 400, 402 (9th Cir. 1997) (quoting Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988)). Motions to amend pursuant to Rule 15(d) should be granted "unless undue prejudice to the opposing party will result." LaSalvia v. United Dairymen of Ariz., 804 F.2d 1113, 1119 (9th Cir. 1986) (quoting Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973)).

Defendants argue that the Court should not grant leave to supplement because (1) leave to permit supplemental pleading "cannot be used to introduce a 'separate, distinct and new cause of action,'" Dkt. # 19 at 7 (quoting Planned Parenthood of S. Ariz., 130 F.3d at 402), (2) supplementation can only be used to add claims that arise from facts which come into existence after the filing of the current complaint, id. (citing Eid v. Alaska Airlines, Inc., 621 F.3d 858, 874 (9th Cir. 2010)), (3) the Court lacks jurisdiction because at the time plaintiff filed its motion to amend and supplement the complaint, 60 days had not yet passed from its issuance of the supplemental notice letter, id. at 7-8, (4) the nature of the relief that plaintiff may seek for the new claims is different from any relief that it may try to seek for the Skykomish Program, id. at 8-11, (5) the interests of parties unrelated to the Skykomish Program will need to be considered, id. at 11-12, and (6) supplementation will complicate attorney's fee issues, id. at 12.

The Court takes these as arguments that defendants would suffer undue prejudice from supplementation of the complaint and considers each in turn.

First, while defendants argue that leave to permit supplemental pleading "cannot be used to introduce a 'separate, distinct and new cause of action,'" Dkt. # 19 at 7 (quoting Planned Parenthood of S. Ariz., 130 F.3d at 402), this is an incomplete recitation of the law. In Cabrera, the Ninth Circuit expanded on this rule, stating, "supplemental pleading cannot be used to introduce a 'separate, distinct and new cause of action' *where the original action between the parties has reached a final resolution and the district court does not retain jurisdiction*." Cabrera, 159 F.3d at 382 n.11 (quoting Planned Parenthood of S. Ariz., 130 F.3d at 402) (emphasis added). This rule does not bar supplementation here because the Court simultaneously considers defendants' motion to dismiss and plaintiff's motion to amend and supplement the complaint, which were both noted for the same day, and thus has yet to enter a final judgment. Cf. Planned Parenthood of S. Ariz., 130 F.3d at 402 (holding that district court lacked jurisdiction to grant plaintiffs' request to supplement their complaint where it had entered final judgment four years prior). Even taking defendants' statement of the law as correct, this argument still fails. In Keith, the Ninth Circuit explained that "[w]hile some relationship must exist between the newly alleged matters and the subject of the original action, they need not all arise out of the same transaction." Keith v. Volpe, 858 F.2d 467, 474 (9th Cir. 1988). The new claims need not address the Skykomish Program; it is sufficient that they are also ESA Section 9 claims regarding defendants' hatchery programs.

Second, the Court agrees that supplementation can only be used to add claims post-dating the complaint. See Fed. R. Civ. P. 15(d). To the extent that plaintiff's new claims do not meet this requirement, it is via plaintiff's tandem request for leave to *amend* that they are approved.

Third, defendants are correct that 60 days from the issuance of the supplemental notice letter had not yet expired at the time that plaintiff filed its motion to amend and supplement the complaint. Dkt. # 19 at 7-8. The 60-day notice period is jurisdictional. See Sw. Ctr. for Biological Diversity, 143 F.3d at 520. Nonetheless, the 60-day notice period has now long-

since expired, and it is measured against the date that the amended and supplemental complaint is actually filed rather than the date that plaintiff requested leave from the Court. See U.S. Dep't of Agric., 772 F.3d at 601-04. This argument therefore fails.

Addressing defendants' fourth and fifth arguments, defendants seem to argue that the Court should not grant leave to supplement because this will be a complicated case. See Dkt. # 8-12. The Court, however, is well-equipped to handle complicated matters. It is unclear how requiring plaintiff to file this as a new suit would uncomplicate the claims. Further, as defendants recognize, additional parties may join or intervene in existing litigation. See Dkt. # 19 at 12. Defendants are welcome to utilize proper procedure to seek to join any other parties that they deem appropriate.

Finally, defendants argue that the Court should deny supplementation because it might complicate an eventual award of plaintiff's attorney's fees. See id. at 12. This falls short of undue prejudice. The Court is confident that plaintiff's counsel will maintain appropriate billing records throughout the course of litigation.

In summary, plaintiff may file its first amended and supplemental complaint, striking the claims dismissed by this Order.

V. Conclusion

For all of the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss Pursuant to FRCP 12(b)(1) & (6) (Dkt. # 16) is GRANTED. Plaintiff's pre-ESA-exemption claims relating to the Skykomish Program are dismissed with prejudice as moot. Plaintiff's post-ESA-exemption claims relating to the Skykomish Program are dismissed without prejudice.
2. Plaintiff's Motion for Leave to File First Amended and Supplemental Complaint (Dkt. # 18) is GRANTED. Plaintiff may file its first amended and supplemental complaint, striking the claims dismissed by this Order and any other moot claims.
3. Plaintiff's Motion to Supplement the Factual Record (Dkt. # 34) is DENIED.
4. The Clerk of Court is directed to return this action to the Court's active caseload.

DATED this 7th day of February, 2023.

Robert S. Lasnik
United States District Judge